IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 204

JOHN LACKNER,

Petitioner,

vs.

ILLINOIS BELL TELEPHONE COMPANY,

Respondent.

BRIEF ON BEHALF OF ILLINOIS BELL TELEPHONE COMPANY, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF FACTS.

This petition involves the same issues of law and fact which have been twice before this Court. *Berman* v. *Illinois Bell Telephone Company,* 304 U. S. 549 (1938); *Slattery, et al.* v. *Illinois Bell Telephone Company,* 307 U. S. 648 (1939).

Such questions as are presented arose out of protracted litigation popularly known as the Chicago Telephone Rate Case which has been before the United States District Court for the Northern District of Illinois, Eastern Division, and this Court for a period of seventeen years. It culminated in the decision of this Court in *Lindheimer* v. *Illinois Bell Telephone Company,* 292 U. S. 151 (1934). Therein the Supreme Court held that an injunction issued

in 1923 restraining the enforcement of an order of the Illinois Commerce Commission, which had reduced certain telephone rates in Chicago, should be dissolved. The Supreme Court in its mandate dated May 31, 1934 (R. 529-532) directed that the District Court should provide for the refunding of the amounts charged by the Company in excess of the rates in suit, in accordance with the terms of the injunction and the Company's bond given to support the same. All questions of public importance have been settled long ago and have been reviewed in repeated appeals to the Circuit Court of Appeals for the Seventh Circuit and to the Supreme Court. The present effort is to secure a different result on particular features upon the petition of a single subscriber.

Upon the filing of the mandate of this Court in the District Court, which had been convoked as a statutory court under Section 266 of the Judicial Code, that Court immediately set about to comply with the mandate. The task was prodigious. It involved a detailed examination of 45,000,000 collection tickets, several million collectors' reports and several hundred ledgers.

Confronted with this problem, the District Court set up a judicial and administrative machinery adequate to accomplish an expeditious compliance with the mandate. In so doing, by agreement of all parties (R. 18, 27), it acted in conformity with recommendations of counsel for the subscribers appointed by the Court (R. 29-43). In accordance with these recommendations and the unanimous agreement of the parties, the Court selected the respondent, rather than a special master, to make the refunds under the supervision of the Court, specified a three-year period during which subscribers should present their claims, provided the manner in which respondent should conduct the refunding, ordered the publication

of notices to subscribers and directed that upon the expiration of such three-year period the respondent, if it complied with the conditions of the decree, should be released from further liability. These provisions were all set forth in the decree entered June 11, 1934, from which no party appealed. For a complete recital of the work of making these refunds, see Plaintiff's Final Report (R. 325-364).

When the three-year period came to an end, the District Court found that respondent had complied with all the requirements of that decree, that the provisions of the decree including the refund period had been approved by all parties at the time of the entry of the decree, and that the decree itself had been final in respect to the length of the refund period as well as in respect to the determination of the right of the respondent to retain moneys which were unclaimed by subscribers during such period. The Court further found that restitution had been made to all subscribers entitled to refunds who had applied for the same and that failure of certain customers to call for their refunds was not caused by any neglect or other action on behalf of the Company, but, on the contrary, the Company and the attorneys representing the customers had advertised and endeavored in all reasonable ways, as directed by the Court, to locate unknown customers and to urge them to make application for their refunds. The Court further found that in many instances the customers entitled to refunds were indebted to the Telephone Company for unpaid telephone bills which would offset the amounts due the customers.* Its conclusion of law was

* Out of a total amount subject to refund of $18,798,980.14, consisting of $14,724,725.99 gross overcharges and $4,074,254.15 interest (R. 329), the Company had been able to refund all except $1,266,757.14 of overcharges, which would have carried with it $440,056.83 in interest (R. 335). Of the total of these unrefundable claims the Court in its opinion estimated that at least one-third represented claims by subscribers owing money to the Company offsetting their claims against the Company (R. 448-449, 455).

that the respondent was entitled to a decree discharging it from further liability and such a decree was entered February 5, 1938 (R. 466-469).

Subsequent to the entry of the order of February 5, 1938, that is, on March 2, 1938, appellant filed his petition for leave to intervene.* In this petition he alleged that he was a former subscriber who had been entitled to a refund which had been paid, except that there had been deducted therefrom by court order and paid to attorneys who had prosecuted the case to a successful conclusion and who had been designated by the Court to preserve the interests of the subscribers, 7½% of such refund (Order of July 23, 1934, R. 46-48). Appellant alleged that this deduction was improper, asked that the previous decrees of the District Court entered on June 1, 1934, July 23, 1934, and February 5, 1938, wherein the attorneys had been appointed to act for the subscribers, their compensation determined, and the Telephone Company finally discharged from further liability, be set aside. The gravamen of the petition for leave to intervene is that all of the said orders and decrees theretofore entered in the proceedings and inconsistent with the relief sought were illegal, because no notice of them had been served upon the appellant as an individual subscriber.

* Leave to intervene for themselves and other subscribers had already been sought by two individual subscribers (R. 318, 402, 425) and already had been denied (R. 464, 470). The denial of one of these petitions (Berman) was already on appeal to the United States Supreme Court (R. 465), which shortly thereafter affirmed the denial (R. 474-475). These petitions are discussed more fully hereafter in Section 2 (p. 8, *et seq.*).

REASONS FOR DENYING THE WRIT.

1. The case presented is not novel in this Court. It has been held many times that individual subscribers are not entitled to notice of nor to intervention in suits involving utility rates and that orders denying such intervention are not appealable.

Throughout the litigation, from the filing of the bill of complaint to the last order entered in the case, petitioner as a subscriber to the telephone service and as a member of the public was represented in this proceeding by the Attorney General of the State of Illinois and by the Illinois Commerce Commission, both parties to the proceedings from its inception. The City of Chicago, which was permitted to intervene almost at the outset of the proceedings, was active throughout the entire case in protecting the public and telephone subscribers, including petitioner.

In administering the refunds, the District Court undertook still further to protect the interests of the subscribers in a variety of ways. In its decree of June 1, 1934, the Court designated Messrs. George I. Haight and Benjamin F. Goldstein, who had conducted the litigation as special counsel for the City of Chicago, to act as counsel for the subscribers and "to protect and preserve" their rights and interests (R. 10-11). The Court, in a series of orders, prescribed in detail the manner in which the Telephone Company should make the refunds, including elaborate provisions in respect to computation, method of payment, search for subscribers, determination of the parties entitled to the refund, and a great variety of related provisions (R. 9, 39, 57, 273). The Telephone Company was required to make periodical reports to the Court, and also to publish from time to time a series of notices to subscribers in

newspapers of general circulation in the City of Chicago (R. 42, 273). Such reports were made (R. 49, 53, 66, 131, 210, 232, 278, 325-364) and such notices were published (R. 134, 264-273, 333, 334). In addition to this, the Court appointed its own representative, Prof. John A. Johnson (R. 52-53), to inform himself in detail in respect to the refunding operations, and to make periodical reports thereon to the Court. Prof. Johnson made twenty interim reports and a final report (R. 75, 143, 179, 203, 207, 223, 228, 236, 240, 244, 248, 252, 256, 260, 274, 286-310, 372-397). Further, the Court required three audits and reports thereon to be made by a firm of certified public accountants, Messrs. Touche, Niven & Company (R. 82-130, 217-221, 429-433).

The Illinois Commerce Commission represents the public and subscribers to the service (and thus petitioner) in suits to which it is a party, so that subscribers are bound by the decrees entered therein. *Smith* v. *Illinois Bell Telephone Company,* 270 U. S. 587 (1926).

When represented by a proper governmental agency, individual subscribers are not permitted to intervene and an order denying such intervention is not an appealable order. *City of New York* v. *New York Telephone Company,* 261 U. S. 312 (1923); *Re Engelhard & Sons Company,* 231 U. S. 646 (1914); *O'Connell* v. *Pacific Gas & Electric Company* (C. C. A. 9th, 1927), 19 F. (2d) 460; *City of New York* v. *Consolidated Gas Company,* 253 U. S. 219 (1920); *San Antonio Utilities League* v. *Southwestern Bell Telephone Company* (C. C. A. 5th, 1936), 86 F. (2d) 584.

Petitioner and other individual subscribers were not parties to the suit at the time that any of the decrees were entered. No statute, rule of court, practice or procedure required or contemplated that such individual subscribers, not parties to the litigation, should be given notice of the

proceedings or proposed proceedings therein. In June, 1934, and for many months later, the identity of individual subscribers entitled to the refunds was not known. To have ascertained this identification and to have served notice in connection with each step in the proceedings, in which approximately a million present and former telephone subscribers were involved, would have created an impossible situation and an unbearable expense.

In *In re Denver & R. G. Western R. Co.*, 13 F. Supp. 821 (1936), individual bondholders sought to intervene in a reorganization proceeding under the Bankruptcy Act. The trustees of various mortgages under which bonds had been issued were parties to the proceeding. Intervention by individual bondholders was denied by the court, which said, at page 823:

> "I am persuaded that Congress did not intend to do away with the limitations on the number of parties that obtained under the equity practice. * * * An enumeration of the possible questions that come before the court, both in the routine management of the property confided to its care, and in effecting a reorganization, are so numerous and varied that to require a notice to every possible interested party would be nothing short of ridiculous, bog down the proceedings by the sheer weight thereof, and greatly increase the expense."

Certainly, the contention of petitioner that the decrees entered or proceedings had on June 1, 1934, July 23, 1934 and February 5, 1938, were invalid because he and other subscribers were not notified thereof is wholly lacking in substance and is no basis for intervention now.*

Petitioner here argues that certiorari should be granted because of the inadequacy of his representation in the

* Not without significance as showing the lack of substance to appellant's contention in respect to notice to individual subscribers is the fact that appellant himself undertook to give no such notice of his petition to other individual subscribers.

District Court. That this is not a fact can be ascertained by the most casual reading of the record, indicating as it does the greatest of care on the part of all persons representing the public and the subscribers to preserve the rights of the public and the subscribers throughout the entire course of the litigation. Even this is not necessary, however, since the petition for intervention filed in the District Court does not allege inadequacy of representation, and since petitioner must be limited to the allegations of his petition for intervention, his argument as to inadequacy of representation is improper and erroneous and should not be considered.

2. Petitioner's prayer to intervene was barred upon principles of res adjudicata.

The correctness of the decision sought to be reviewed has already been determined by this Court. Prior to Lackner's petition for leave to intervene, two other individual subscribers had petitioned for and been denied leave to intervene on their own behalf and on behalf of all other subscribers as a class. One of these petitions (filed by Schaffner) was denied in the final decree of February 5, 1938 (R. 470) and no appeal was taken therefrom. The other petition to intervene (filed by Berman) was denied on January 24, 1938, by Judge Evan A. Evans (R. 464), and again in the final decree of February 5, 1938. An appeal was taken by Berman from the denial of his petition to the United States Supreme Court, which affirmed the decision of the District Court without opinion. *Berman* v. *Illinois Bell Telephone Company,* 304 U. S. 549 (1938) (R. 474-476).

Berman's petition was identical in every essential point with Lackner's petition. Berman sought to intervene on behalf of himself and other subscribers. Berman sought

reimbursement for the 7½ per cent deduction from his refund on account of fees allowed by the District Court to Messrs. Haight and Goldstein. Berman sought to charge the unrefunded amounts remaining in the possession of the Telephone Company at the termination of the refund period with these deductions. In fact, the only difference between the two petitions is that Berman expressed a willingness to distribute such amount among the subscribers who had received refund checks (R. 318-325), while the appellant asks that a Master be appointed for this purpose (R. 478-488). In every essential particular, in fact down to the smallest detail, the two petitions for leave to intervene are alike in theory, in substance, in form, and in the ultimate relief requested. In both, the petitioners sought to intervene on behalf of the subscribers as a class. An examination of the two petitions laid side by side shows quite conclusively that Lackner had before him the Berman petition when he prepared and submitted his, and that he used it as a pattern.

If either petition is sufficient as a proceeding on behalf of a class, both are sufficient in that respect. On this assumption Lackner, the appellant here, was, of course, a member of the class for whom Berman sought to intervene. As such, he was bound as a party by the action of the District Court denying Berman's petition, and the decision of the Supreme Court affirming the District Court.

The law is well settled that a decree in a class action is binding upon all members of the class which was represented as a whole. In *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U. S. 356 (1921), the Supreme Court considered the effect of a dismissal of a class suit brought by a few non-resident members of an association on behalf of all of the members numbering more than 70,000. This suit had been dismissed for want of equity. Later other members of the class threatened to file similar suits

in the state courts, in which the same matters would have been relitigated. Thereupon an ancillary bill was filed in the original suit to enjoin all members of the association from instituting any such actions, on the ground that they had been bound by the prior decree. The lower court dismissed this ancillary bill. The Supreme Court, however, on appeal, reversed the lower court and held that, as members of the class, the prospective litigants were bound by the original decree. This was so even though they were not named parties to the original suit. Nevertheless, they were held to have been represented therein as members of a class. The Supreme Court held that if the original decree was to be effective and conflicting judgments avoided, all members of the class must be concluded by the decree. At page 367 the court said:

> "If the Federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree, when rendered, must bind all of the class properly represented. The parties and the subject-matter are within the court's jurisdiction. It is impossible to name all of the class as parties, where, as here, its membership is too numerous to bring into court. The subject-matter included the control and disposition of the funds of a beneficial organization, and was properly cognizable in a court of equity. The parties bringing the suit truly represented the interested class. If the decree is to be effective, and conflicting judgments are to be avoided, all of the class must be concluded by the decree."

We have previously noted that the same rule has been applied in respect of telephone subscribers who have been held to be bound by a decree entered in a suit against the Illinois Commerce Commission. *Smith* v. *Illinois Bell Telephone Company,* 270 U. S. 587 (1926). In the language of the Supreme Court in that case "the commission represents the public and especially the subscribers, and they are properly bound by the decree" (p. 592).

Further, it has been held that an order, which denies a petition for leave to intervene, is such an order as constitutes *res adjudicata* with respect to a subsequent petition seeking the same relief. *United States Trust Company* v. *Chicago Terminal Transfer Railway Company* (C. C. A. 7th, 1911), 188 Fed. 292; *Beers* v. *Equitable Trust Company* (C. C. A. 8th, 1923), 286 Fed. 878.

It is therefore clear (1) that the principle of *res adjudicata* is applicable to all members of a class in a class suit, and (2) that the denial of an intervening petition constitutes *res adjudicata* as to subsequent petitions for leave to intervene. Hence, the decision of the District Court on Berman's appeal for leave to intervene affirmed by the Supreme Court constitutes *res adjudicata* as to Lackner, who was one of the class of subscribers for whom Berman sought to intervene.

3. Petitioner has no right to intervene for the purposes stated in the petition.

Petitioner, represented as he was throughout the entire litigation by counsel, seeks to intervene in this case for the purpose of attacking and having set aside the decrees theretofore entered by the District Court on June 1, 1934, July 23, 1934, and the final decree entered in this cause on February 5, 1938. Paragraph numbered E of the prayer of petitioner's petition to intervene asks (R. 487):

> "That the findings of fact, conclusions at law and final decree in its entirety entered herein on February 5, 1938, be vacated and set aside, and held for naught and the decree entered herein on June 1, 1934, in so far as it designates certain attorneys to protect and preserve the interests of various subscribers and the order of July 23, 1934, in so far as it fixes the fees of said attorneys, be vacated, modified or amended in conformity with the prayer hereof."

It is a well settled rule that intervention will not be

allowed for the purpose of impeaching a decree already made. *United States* v. *California Co-Op. Canneries*, 279 U. S. 553 (1929).

4. The correction of the record in the Circuit Court of Appeals by the inclusion of the check paid to petitioner was not error.

When petitioner in his reply brief before the Circuit Court of Appeals for the first time asserted that he was without knowledge of the deduction of attorneys' fees and the date at which the computation of interest had been discontinued, the Company, acting under paragraph (h) of Rule 75 of the Federal Rules of Civil Procedure, filed its suggestions for correction of the record so as to include the check paid to petitioner (R. 524-527). These suggestions as to this correction set forth the following averments (R. 525):

> "2. The check to Appellant covering his refund, dated April 23, 1935, shows on its face the deduction of 7½ per cent for attorneys' fees as ordered by the District Court on July 23, 1934, and likewise shows on its face that interest was added to the overcharges at the rate of 5 per cent per annum from the date of collection up to June 1, 1934, as ordered by the District Court June 11, 1934. The early date upon which Appellant was so directly and personally put upon notice of these facts becomes of value in the light of the alleged lack of such notice argued in Appellant's Reply Brief.
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> "All of the refund operations of Illinois Bell Telephone Company and all records made in connection therewith were under the jurisdiction of the District Court. The District Court had its own representatives present to supervise and check the operations and records of the Company throughout the refunding process. While this particular check was not formally introduced in evidence in this proceeding, it was one of the checks issued by the Telephone Company pursuant to the order of the Court and was retained by

it as a part of the records within the jurisdiction of the Court. The District Court had knowledge of the form of the checks issued by the Telephone Company under its direction in payment to subscribers entitled thereto and that such checks disclosed in each instance that attorneys' fees of 7½ per cent had been deducted and that interest on the refunds had been included up to June 1, 1934 pursuant to the decree of June 11, 1934 of the District Court. Under these circumstances, we submit that the reviewing Court is entitled to be advised of the facts in respect to the payment to Appellant under the order of the District Court as disclosed by the record preserved by order of that court and within its jurisdiction."

By order of the Circuit Court of Appeals dated February 6, 1940, the refund check was made a part of the record. (R. 537.)

The effect of the inclusion of this check in the record merely served to confirm what would have been presumed to be the fact in its absence. Petitioner had not pleaded lack of knowledge in his petition for intervention and since the facts are presumed against him in that respect, the inclusion of the check itself corroborates the presumption flowing from the failure to plead lack of actual knowledge.

5. Petitioner has no right to intervene under decisions and rules.

At the time petitioner presented his motion for leave to intervene, on March 2, 1938, the matter of intervention was governed by Federal Equity Rule 37. Prior to the time that the petition was denied by the District Court, the Federal Rules of Civil Procedure, including Rule 24(a), had become effective on September 16, 1938.

The Advisory Committee's Note in respect to this rule says:

"This rule amplifies and restates the present fed-

eral practice at law and in equity." (U. S. Supreme Court Reports Digest, Vol. 11, page 410.)

A comparison of the rule as adopted with the decisions prior to the adoption fully bears out the Advisory Committee's Note.

It is evident, therefore, that petitioner had no new rights granted him to intervene by reason of the fact that this rule became effective; nor did that fact refresh any rights already stale. Moreover, petitioner's belated attempt to intervene flies in the face of the specific provision of the rule (and prior holdings of the courts) that application must be timely.

As we have noted many times above, petitioner did not seek intervention until March, 1938, at which time he sought to set aside orders theretofore entered in the cause at times almost four years prior to his petition for intervention. Federal Equity Rule 24(a) and the cases relating to intervention prior to the adoption of that rule all require "timely application" for intervention.

In the absence of special circumstances, intervention is never permitted after final judgment or decree. *Clarke* v. *Boysen, et al.* (C. C. A. 8th, 1922), 285 Fed. 122; *Caldwell* v. *Guardian Trust Co.* (C. C. A. 8th, 1928), 26 F. (2d) 218; *Hight* v. *Batley,* 32 Wash. 165, 72 Pac. 1034 (1903). Even where there would have been a right to intervene if applied for prior to decree, delay until after decree has been entered makes the intervention discretionary only. *Bogart* v. *Southern Pac. Co.* (C. C. A. 2d, 1923), 290 Fed. 727 at 731. Likewise, it is a well settled rule, as stated by Mr. Justice Brandeis, "that intervention will not be allowed to impeach a decree already made." *United States* v. *California Co-Op. Canneries,* 279 U. S. 553 (1929). See also to the same effect in this Circuit: *Rheinberger* v. *Security Life Insurance Co. of America* (C. C. A. 7th, 1934), 72 F. (2d) 147.

Concerning the timeliness of the application, the Circuit Court of Appeals said:

> "It cannot be said that petitioner's petition to intervene was timely; and in our opinion it would be a misapplication of the rule permitting intervention to allow petitioner to intervene after final judgment to upset an order of the court of which he had actual notice more than two years prior to final judgment, and, especially so, when it appears that he had accepted the benefits of the order with full knowledge of, and acquiescence in, that portion of the order of which he now complains."

A substantially similar problem was considered recently by Judge Chesnut in the District Court of Maryland. In *The Baltimore Trust Company* v. *Interocean Oil Company*, 30 F. Supp. 484 (November 14, 1939), the intervening petition of one Hoffman, alleged holder of one bond of the Interocean Oil Company, was under consideration. It appeared that orders had been theretofore entered which the intervening petitioner desired to attack and concerning which he desired an appeal. The court said:

> "* * * But apart from this, I have reached the conclusion, after some consideration of arguments of counsel, that the petition should be denied because it was not 'timely filed.' Rule 24 of Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723c, provides for intervention both of right and permissive but only 'upon timely application.' Here the petition was not filed 'timely' as it comes five weeks after the decree and after appeal therefrom has been taken by the American Trading and Production Corporation; and is professedly filed only for the purpose of taking an appeal from that decree.
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> "While I am reluctant to exercise a discretion in refusing the petition for intervention which may seem to limit or restrict in any way the full opportunity for appeal as to any aspect of the decree of September 25, 1939, I have concluded that in the particular case it is my duty to deny this petition. Petitions for intervention after a decree are very un-

usual and are seldom granted. *United States* v. *Northern Securities Co.*, C. C., 128 F. 808; *Cincinnati, I. & W. R. Co.* v. *Indianapolis Union R. Co.*, 6 Cir., 279 F. 356. In a very similar case in this circuit leave to intervene was denied to an individual bondholder who desired to be made a party so that he could appeal from a prior decree. In that case the holding was placed particularly on the ground that the bondholder was represented in the proceeding by a mortgage trustee who had elected not to appeal. *Fink* v. *Bay Shore Terminal Co.*, 4 Cir., 144 F. 837, affirmed, 203 U. S. 577, 27 S. Ct. 777, 51 L. ed. 325. See also *Stallings* v. *Conn*, 5 Cir., 74 F. 2d 189; *Palmer* v. *Bankers' Trust Co.*, 8 Cir., 12 F. 2d 747; *Caldwell* v. *Guardian Trust Co.*, 8 Cir., 26 F. 2d 218; *United States* v. *California Co-operative Canneries*, 279 U. S. 553, 556, 49 S. Ct. 423, 73 L. ed. 838; *Rheinberger* v. *Security Life Ins. Co.*, 7 Cir., 72 F. 2d 147."

WHEREFORE, respondent prays that the Petition for a writ of certiorari be denied.

Dated: July 25, 1940.

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